PROFESSIONAL SERVICES AGREEMENT

Engineering, Rail Systems and Architecture Service Provider

CONTRACT NUMBER: XXX

BETWEEN

The Director General
(or his delegate) of
Department of Transport
acting for and on behalf of the Crown
in right of the State of New South Wales

ABN 11 370 995 518

(the Principal)

AND

AECOM Australia Pty Ltd

ABN 20 093 846 925

(the Service Provider)

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THIS AGREEMENT is made

BETWEEN The **Director General** (or his delegate) of **Department of Transport** acting for and on behalf of the Crown in right of the State of New South Wales, of 18 Lee Street, Chippendale, NSW 2008, **ABN** 11 370 995 518 (the **Principal**).

AND **AECOM Australia Pty Ltd** of Level 8, 540 Wickham Street, PO Box 1307 Fortitude Valley QLD 4006 Australia **ABN** 20 093 846 925 (the **Service Provider**).

OPERATIVE CLAUSES

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1. DEFINITIONS AND INTERPRETATION

1.1 In this Agreement, unless the context requires:

Agreement means this document and includes any annexures to it.

Business Day means any day other than:

(a) a day that is a Saturday, Sunday or public holiday generally in Sydney; or

(b) 27, 28, 29, 30 or 31 December.

Commencement Date means the date specified in Item 3A of the Contract Particulars.

Confidential Information means all information of any nature and in any form and all other knowledge which has come to the knowledge of the Service Provider by any means or which has been or will be given to the Service Provider either directly or indirectly by or on behalf of the Principal that:

(a) is by its nature confidential;

(b) is designated, or marked, or stipulated as confidential;

(c) the Service Provider knows or ought to know is confidential;

and includes but is in no way limited to:

(d) the Contract Material;

(e) the Principal's Material;

(f) any material which relates to the affairs of a third party;

but does not include information which:

(g) is or becomes public knowledge other than by breach of this Agreement or through breach of any confidentiality deed poll executed pursuant to clause 4.10(e) or through breach of any other obligation of confidence;

(h) is in the lawful possession of the Service Provider without restriction in relation to disclosure before the date of receipt of the information from the Principal or a third

party.

Contract Material means any Material created, written or otherwise brought into existence by or on behalf of the Service Provider in the course of performing this Agreement in which subsists newly created Intellectual Property rights.

Contract Particulars means the document which is annexed as Annexure A to this Agreement.

Disbursements means the expenses reasonably payable and properly incurred by the Service Provider, payable by the Principal in accordance with the Contract Particulars. Disbursements will be payable at cost.

End Date means the date specified in Item 3B of the Contract Particulars.

Existing Contract Material means any Material which exists at the date of this Agreement and which is incorporated with the Contract Material.

Fee or **Fees** means the fee or fees described in the Contract Particulars.

GST has the meaning given to this term in the GST Law.

GST Law means A New Tax System (Goods & Services Tax) Act 1999, related legislation and any delegated legislation made pursuant to such legislation.

Intellectual Property includes any and all intellectual and industrial property rights throughout the world, whether subsisting now or in the future and includes all copyright and analogous rights, all rights in relation to inventions (including patent rights), registered and unregistered trade marks, designs (whether or not registered or registrable), circuit layouts, trade names, trade secrets, business names, company names or internet domain names.

Key Personnel means the persons specified in Item 8 of the Contract Particulars as replaced from time to time in accordance with clause 4.3.

Material includes documents, information and data stored by any means.

Moral Rights means the right of integrity of authorship, the right of attribution of authorship and the right not to have authorship falsely attributed, more particularly as conferred by the Copyright Act 1968 (Cth), and rights of a similar nature anywhere in the world whether existing at the commencement date of this Agreement or which may come into existence on or after the commencement date.

Payment Claim means a payment claim issued by the Service Provider under clause 6.1.

Payment Statement means a payment statement issued by the Principal under clause 6.2(a).

Personal Information means information or an opinion (including information or an opinion forming part of a database) whether true or not and whether recorded in a material form or not, about an individual whose identity is apparent or can reasonably be ascertained from the information or opinion.

Principal's Material means any Material supplied by the Principal to the Service Provider by whatever means in relation to this Agreement.

Related Body Corporate has the meaning given to that term in section 9 of the Corporations Act 2001 (Cth).

Services Brief means the document which is annexed as Annexure C to this Agreement, as amended from time to time in accordance with clause 8 or by agreement in writing between the parties.

Services means the services set out in the Contract Particulars and any incidental or related services requested in writing by the Principal.

Supply has the meaning given to it in the GST Law.

Term means the period specified in clause 2.

Variation means an alteration, or addition to, or reduction or omission from the Services.

1.2 In this Agreement:

(a) headings are for convenience only and do not affect interpretation;

and the following rules apply in interpreting this Agreement unless the context makes clear that a rule is not intended to apply:

(b) an obligation or a liability assumed by, or a right conferred on, two or more persons binds or benefits them jointly and severally;

(c) "**person**" includes an individual, the estate of an individual, a corporation, an authority, an association or a joint venture (whether incorporated or unincorporated), a partnership and a trust;

(d) a reference to a party includes that party's executors, administrators, successors and permitted assigns, including persons taking by way of novation;

(e) a reference to a document (including this Agreement) is to that document as varied, novated, ratified or replaced from time to time;

(f) a reference to a statute includes its delegated legislation and a reference to a statute or delegated legislation or a provision of either includes consolidations, amendments, re enactments and replacements;

(g) a word importing the singular includes the plural (and vice versa), and a word indicating a gender includes every other gender;

(h) a reference to a party, clause, schedule, exhibit, attachment or annexure is a reference to a party, clause, schedule, exhibit, attachment or annexure to or of this Agreement, and a reference to this Agreement includes all schedules, exhibits, attachments and annexures to it;

(i) if a word or phrase is given a defined meaning, any other part of speech or grammatical form of that word or phrase has a corresponding meaning;

(j) "**includes**" in any form is not a word of limitation; and

(k) a reference to "**$**" or "**dollar**" is to Australian currency.

1.3 If the day on or by which anything is to be done under this Agreement is not a Business Day, that thing must be done no later than the next Business Day.

1.4 No provision of this Agreement is to be interpreted to the disadvantage of a party because that party (or its representative) drafted that provision.

1.5 Any provision of this Agreement which seeks to limit or exclude a liability of a party is to be construed as doing so only to the extent permitted by law.

1.6 Where a reference is made to any body or authority which ceases to exist (Former Body), that reference will be to that body or authority (Replacement Body) which then serves substantially the same functions as the Former Body. Any reference to any senior officer of the Former Body will be to the equivalent senior officer of the Replacement Body.

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2. TERM

(a) This Agreement commences on the Commencement Date and, unless terminated by the Principal in accordance with this Agreement or at law, expires on the End Date.

(b) The parties may agree to extend the Term of this Agreement for such period and on such terms as are agreed between the parties.

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3. CONFLICT OF INTEREST

3.1 The Service Provider undertakes that at the date of this Agreement, no conflict of interest exists or is likely to arise in the performance of the Services in respect of the Service Provider or any of its employees, agents or subcontractors, except as has been disclosed in writing by the Service Provider to the Principal prior to the execution of this Agreement. The Service Provider must use reasonable endeavours to ensure no conflicts of interest arise and notify the Principal, in writing, immediately upon becoming aware of the existence, or possibility, of a conflict of interest.

3.2 On receipt of a notice under clause 3.1, the Principal may:

(a) approve the Service Provider continuing to perform the Services, which approval may be subject to conditions specified by the Principal (including requirements relating to separation arrangements) to ensure appropriate management of the conflict; or

(b) where in the Principal's view the conflict of interest cannot be appropriately managed, terminate this Agreement by notice in writing to the Service Provider effective from the date specified in the notice.

3.3 The Principal may, at its sole discretion and at any time, require the Service Provider to sign and procure that each of its officers, employees, subcontractors or agents involved in

the performance of the Services signs and delivers to the Principal a Statement of Interests and Associations in the form attached in Annexure D2.

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4. SERVICE PROVIDER'S OBLIGATIONS

4.1 Professional standard of care

(a) The Service Provider must provide the Services in accordance with this Agreement including the Services Brief.

(b) Without limiting the generality of clause 4.1(a), the Service Provider must:

(i) perform the Services in a diligent manner and to the standard of skill and care expected of a Service Provider qualified, competent and experienced in the provision of services of the nature of those set out in the Services Brief;

(ii) comply with all obligations and meet all requirements set out in this Agreement, including any Annexures to it; and

(iii) comply with all laws and all applicable requirements of any government authority or agency.

4.2 Knowledge of requirements of the Principal

The Service Provider must use all reasonable efforts to inform itself of the detailed requirements of the Principal and must regularly consult with the Principal during the performance of the Services.

4.3 Personnel

The Service Provider must:

(a) ensure that all personnel utilised by it in connection with the Services are appropriately qualified, competent and experienced in the provision of services of the nature of the Services;

(b) subject to clauses 4.3(c) and 4.3(d), employ the person or persons specified in the Contract Particulars as "Key Personnel" in the performance of the Services in the roles specified for them in the Contract Particulars;

(c) to the extent reasonably possible, retain the Key Personnel as the personnel performing the Services and not change any of them without the prior written consent of the Principal. In the event that any of the Key Personnel ceases to be employed either directly or indirectly by the Service Provider, the Service Provider will be responsible (at no additional cost to the Principal) to find a suitable replacement;

(d) immediately take steps to replace any Key Personnel who are unable to work or are requested by the Principal, acting reasonably, to be removed from the Services with a replacement of equivalent expertise and experience;

(e) obtain the written approval of the Principal, which will not be unreasonably withheld, to the replacement of any Key Personnel or the appointment of any new personnel to perform the Services prior to engaging them;

(f) the Service Provider's responsibility for the performance of the Services and for the standard of performance by its personnel is not altered in any way by this clause 4.3 or by anything done in accordance with this clause 4.3.

4.4 Discrepancies in information

If the Service Provider considers that any information, documents and other particulars made available to it by any person on behalf of the Principal are inadequate or contain errors or ambiguities, the Service Provider must give written notice to the Principal detailing the errors or ambiguities as soon as practicable. Rectification of errors or ambiguities shall be the responsibility of the person supplying the information or documents, but the Principal shall use reasonable endeavours to procure such rectification.

4.5 Program

The Service Provider must, if required by the Principal as set out in the Contract Particulars:

(a) within 7 days of the commencement of the services submit, for the approval of the Principal, a program for the performance and completion of the Services that accords with the dates and deliverables specified in the Services Brief;

(b) submit a revised program as soon as practicable after any reasonable request by the Principal to do so for approval by the Principal. Except to the extent required to reflect delays caused by the Principal, the Principal is under no obligation to approve any revised program submitted by the Service Provider;

(c) perform the Services expeditiously and in accordance with the most recent program approved by the Principal; and

(d) report on progress against the program monthly or at such other interval as requested in writing by the Principal.

4.6 Reports and deliverables

The Service Provider must provide the reports and deliverables:

(a) containing the information;

(b) in the format;

(c) meeting the requirements and standards; and

(d) on the dates,

as may be specified in or required by the Services Brief.

4.7 Change in the scope or timing of the Services

As soon as practicable after becoming aware of any matter which is likely to change or

which has changed the scope or timing of the Services (including any notice, direction or instruction of the Principal), the Service Provider must give notice to the Principal detailing the circumstances, extent or likely extent and implications of the change.

4.8 Principal's Materials

The Service Provider must protect and keep safe and secure all of the Principal's Materials provided to the Service Provider.

4.9 Service Provider's relationship with the Principal

The Service Provider must liaise, co-operate and confer with the Principal and every other person performing works relating to the Services and any other person nominated by the Principal. Nothing in this Agreement will be construed or interpreted as constituting a relationship between the Principal and the Service Provider of partners, joint venturers, fiduciaries, employer and employee or principal and agent. The Service Provider must not act outside the scope of the authority conferred on it by this Agreement and must not purport to bind the Principal in any way or hold itself out as having any authority to do so, except as specifically authorised pursuant to this Agreement.

4.10 Confidentiality

(a) Subject to clause 4.10(c) the Service Provider must:

(i) not disclose any Confidential Information to any person without the prior written consent of the Principal;

(ii) take all reasonable steps to ensure that the Confidential Information in its possession is kept confidential and protected against unauthorised use and access; and

(iii) comply with any security measures required by the Principal in connection with the Confidential Information.

(b) The Service Provider agrees to use the Confidential Information solely for the purposes of the Services and for no other purpose unless otherwise approved in writing by the Principal.

(c) The Service Provider may disclose Confidential Information:

(i) to its officers, employees, agents and permitted subcontractors (**permitted recipient**) where such disclosure is essential to carrying out their duties or in accordance with this Agreement; or

(ii) if required by law, a Court or tribunal or by the listing rules of the Australian Stock Exchange.

(d) Before disclosing the Confidential Information to a permitted recipient, the Service Provider will ensure that the permitted recipient is aware of the confidentiality requirements of this Agreement and is advised that he, she or it is strictly forbidden from disclosing the Confidential Information or from using the Confidential Information other than as permitted by this Agreement.

(e) The Principal may, at its sole discretion and at any time, require the Service

Provider to arrange for a permitted recipient to execute a confidentiality deed in the form set out in Annexure D1 relating to the non-disclosure and use of Confidential Information and the Service Provider will promptly arrange for such deed to be executed and provided to the Principal.

(f) The Confidential Information must not be copied or reproduced by the Service Provider and/or the permitted recipient without the express prior written permission of the Principal, except for such copies as may be reasonably required to accomplish the purpose for which the Confidential Information was provided pursuant to this Agreement.

(g) Without limiting any rights or remedies of the Principal, the Service Provider acknowledges that damages may not be a sufficient remedy for the Principal for any breach of this clause 4.10 and that the Principal may seek injunctive relief for any breach or threatened breach of this clause 4.10.

4.11 Privacy and disclosure of Personal Information

Without limiting any obligation that the Service Provider has under any applicable privacy laws, where the Service Provider has access to Personal Information in order to fulfil its obligations under this Agreement, it must:

(a) where the Service Provider is responsible for holding the Personal Information, ensure that Personal Information is protected against loss and against unauthorised access, use, modification or disclosure and against other misuse;

(b) where collecting personal information on behalf of the Principal, comply with the Privacy and Personal Information Act 1998 as if it were the Principal;

(c) not use, access or disclose Personal Information other than for the purposes of the Agreement except with the prior written approval of the Principal;

(d) ensure its officers, employees, agents and sub-contractors comply with the Service Provider's obligations under this clause including, when requested by the Principal, requiring those officers, employees, agents and sub-contractors to promptly sign a suitable privacy deed relating to Personal Information. The Service Provider will promptly arrange for such deed to be executed and provided to the Principal;

(e) comply with such other privacy and security measures or directions as the Principal reasonably advises the Service Provider in writing from time to time, including directions to return or destroy the personal information;

(f) immediately notify the Principal upon becoming aware of any breach of clause 4.11; and

(g) ensure that its subcontracts contain the same or equivalent obligations as are set out in this clause 4.11.

4.12 Compliance with law & government guidelines

The Service Provider must, to the extent the same are relevant to this Agreement and/or the performance of the Services comply with all laws, regulation, privacy principles, codes of practice, Australian and/or ISO standards, including any NSW Government guidelines.

4.13 Service Provider's Representative

The person named in Item 5 of the Contract Particulars as having conduct of this engagement on behalf of the Service Provider, or such other person as nominated in writing by the Service Provider and approved by the Principal from time to time, will be responsible to the Principal for all aspects of the Services and has the legal power to bind the Service Provider in respect of any matters arising in connection with the Services.

4.14 Subcontracting and assignment

(a) The Service Provider must not assign or subcontract any part of the Services without the prior written approval of the Principal, which approval may be given or withheld in the Principal's absolute discretion, the Principal may, in giving its approval, impose such conditions as it sees fit.

(b) The existence of any subcontract or supply contract or any approval given by the Principal permitting the Service Provider to assign or subcontract any portion of the Services does not relieve the Service Provider from any of its obligations and liabilities pursuant to this Agreement and the Service Provider will be vicariously liable for all acts, omissions or defaults of its subcontractors and suppliers.

(c) Prior to any sub-contractor or any employee or agent of the subcontractor commencing work in respect of the Services, the Service Provider will obtain from that person, and provide to the Principal, a written assignment from the person to the Principal of the Intellectual Property created as a result of the person performing that work.

(d) The Principal will have no contractual relationship with and undertakes no obligations to any person to whom any part of the Services are subcontracted.

(e) Payment for any subcontract approved after the commencement of the Services will be based on payment at cost and may include an agreed margin payable to the Service Provider to reimburse the costs of engaging the subcontractor. For the avoidance of doubt, this does not include any subcontractors engaged at the time of entering into the Agreement.

4.15 Fitness for purpose

The Service Provider acknowledges and agrees that the Principal relies upon the skill and knowledge of the Service Provider in providing the Services. The Service Provider must ensure that all work, documents and deliverables produced by it are reasonably suitable in all respects for the purposes required by this Agreement.

4.16 Access to Service Provider's premises

The Service Provider must, at all reasonable times and upon reasonable notice, permit the Principal access to the Service Provider's premises in order for the Principal to inspect, discuss and assess the Contract Material and any other material obtained by the Service Provider from any person in connection with the Services.

4.17 Insurances

(a) Prior to commencement of the Services, the Service Provider must, and must ensure that any subcontractors have and maintain with a reputable insurance

company:

(i) a public liability policy of insurance to the value of at least the amount specified for public liability insurance in Item 9 of the Contract Particulars in respect of each claim for the duration of the Services;

(ii) workers' compensation insurance as required by all relevant laws of Australia relating to workers' compensation for the duration of the Services; and

(iii) a professional indemnity policy of insurance to the value of at least the amount specified for professional indemnity insurance in Item 9 of the Contract Particulars in respect of each claim for the period stated in the Contract Particulars, and if no period is stated, for six years following the expiration or earlier termination of this Agreement.

(b) If the Principal at any time requires the Service Provider to arrange insurance against a risk not provided for or contemplated under clause 4.17(a) or increase the extent of an existing insurance in relation to a risk contemplated under clause 4.17(a), it may notify the Service Provider in writing and request that the Service Provider give effect to its requirements.

(c) The Service Provider must promptly inform the Principal of the amount of any additional premium payable in giving effect to a notice of the Principal under clause 4.17(b) before it implements the requirement, and the Principal will advise the Service Provider whether it still requires the Service Provider to give effect to that requirement.

(d) The cost of any additional premiums paid on any additional, increased or varied insurances required by the Principal under clause 4.17(c) will be determined in accordance with clause 8.

(e) The Service Provider shall, on request from time to time by the Principal, produce to the Principal, satisfactory evidence of insurance.

4.18 Records

(a) **Keeping of records**

The Service Provider must, during the period of this Agreement:

(i) keep proper accounts, records (including information stored by computer and other devices) and time sheets in accordance with accounting principles generally applied in commercial practice in respect of its time charge billing, its reimbursable expenditure and fees and reimbursements payable to others properly engaged pursuant to this Agreement and maintain the same for a period of 7 years; and

(ii) manage all records relating to its provision of the Services in accordance with the Services Brief and the reasonable requirements of the Principal.

(b) **Access**

The Service Provider must:

(i) within a reasonable time of any request by the Principal, give the Principal access to, or verified copies of, any information, documents or materials (including its books and records) which may be reasonably required to enable any claim by the Service Provider to payment to be substantiated and verified by the Principal; and

(ii) do everything reasonably required by the Principal, to allow the Principal to conduct an audit of the Service Provider's compliance with this Agreement, including to allow the Principal to verify any claim by the Service Provider for payment.

(c) **Immediate right of access**

Upon request by the Principal, the Service Provider must give the Principal:

(i) full and immediate access to information contained in records held by the Service Provider that:

A. relate to the Service Provider's provision of the Services;

B. has been collected by the Service Provider from members of the public to whom the Service Provider provides or offers to provide services in providing the Services; and

C. the Service Provider has received from the Principal to enable the Service Provider to provide the Services; and

(ii) such other assistance as the Principal may reasonable require in order to meet its obligations under the Freedom of Information Act 1989 (NSW) or, once it commences, the Government Information (Public Access) Act 2009 (NSW).

4.19 Government disclosures

(a) The Service Provider authorises the Principal, its employees and agents to make information concerning the Service Provider available to NSW government departments or agencies. Such information may include, but need not be limited to, any information provided by the Service Provider to the Principal and any information relating to the Service Provider's performance under the Agreement.

(b) The Service Provider acknowledges that any information about the Service Provider from any source, including but not limited to substantiated reports of unsatisfactory performance, may be taken into account by the Principal and NSW government departments and agencies in considering whether to offer the Service Provider future opportunities for NSW government work.

(c) The Service Provider authorises the Principal to disclose certain contract information relating to the Agreement in accordance with section 15(A) of the Freedom of Information Act 1989 (NSW) or, once it commences, the Government Information (Public Access) Act 2009 (NSW). Contract information to be disclosed will be posted on the NSW eTendering website.

4.20 Directions

(a) The Service Provider must comply with any direction of the Principal's

Representative. Except where this Agreement states a direction must be in writing, a direction may be given orally.

(b) If the Service Provider requests the Principal to confirm an oral direction, the Principal must as soon as practicable confirm the oral direction in writing.

4.21 Performance reporting

The Principal will provide performance reports of the Service Provider's performance at the intervals set out in the Services Brief or as otherwise notified by the Principal.

The Service Provider must provide the Principal with any assistance or documentation reasonably required by the Principal for the purposes of the Principal carrying out its performance reporting requirements.

4.22 Coordination

In performing the Services, the Service Provider must co-ordinate and liaise with every other person performing any other work in connection with the Services to ensure that the Services and the other work is completed in such a way that no additional costs and no, or only minimal, delays are incurred with respect to the Services or any other work. For the avoidance of doubt, the Service Provider is not entitled to receive additional payment for complying with this clause.

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5. PRINCIPAL'S OBLIGATIONS

5.1 Provide information

The Principal will, as soon as reasonably practicable, make available to the Service Provider all relevant material and particulars within the Principal's possession or control, give all necessary instructions and answer any queries made by the Service Provider relating to the Principal's requirements in connection with this Agreement.

5.2 Principal's Representative

The person named in Item 6 of the Contract Particulars as the Principal's Representative, or any alternate person the Principal nominates in writing, will act as the Principal's Representative and will have authority to act on behalf of the Principal for all purposes in connection with this Agreement.

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6. PAYMENT

6.1 Payment Claim

(a) Subject to clause 6.4 and the performance of the Services by the Service Provider in accordance with this Agreement, the Principal will pay the Service Provider the Fee and any Disbursements on the basis and at the times or in the circumstances specified in the Contract Particulars in accordance with this clause 6.

(b) The Service Provider must prepare and submit to the Principal, Payment Claims, in the form agreed to by the parties, for the amounts payable under clause 6.1(a) at the dates set out in the Contract Particulars, itemising the Fee payable and containing such further details as are required by the Principal from time to time.

(c) Where Disbursements include engaging approved subcontractors in accordance with clause 4.14, then the Payment Claim must clearly identify the cost and any margin agreed by the Principal, payable to the Service Provider.

(d) Unless otherwise specified in the Contract Particulars:

(i) the Fees are payable by the Principal on a calendar monthly basis in arrears;

(ii) where any of the Fees are calculated on a time basis, the Payment Claim must be for the period up to the last calendar day of the month prior to the issue of the Payment Claim and accompanied by timesheets and a summary of the applicable Services performed in the time period of the claim to which such Fees relate;

(iii) all Disbursements (if any are specified in the Contract Particulars) will be reimbursed at cost.

(e) All Payment Claims must be addressed to the Principal and must refer to the Contract number on the cover page of this Agreement.

(f) It is a condition precedent to the Service Provider's right to submit a Payment Claim under this clause 6.1 that the Service Provider must:

(i) in respect of each Payment Claim, provide the Principal a duly completed and signed statement in the form contained in Annexure E to this Agreement (or in any other form requested or approved by the Principal's Representative) together with a certificate of currency in respect of its workers compensation insurance;

(ii) have submitted proof of insurance in accordance with clause 4.17.

6.2 Payment Statement

(a) If the Principal intends to make a payment that is less than the amount claimed by the Service Provider, within the time period stated in the Contract Particulars of receiving a Payment Claim under clause 6.1, Principal must give the Service Provider a Payment Statement which sets out:

(i) the value of the Services completed in accordance with the Agreement;

(ii) the amount already paid to the Service Provider;

(iii) the amount that the Principal is entitled to retain, deduct, withhold or set-off under the Agreement;

(iv) the amount (if any) which the Principal proposes to pay to the Service Provider;

(v) the reason why an amount in paragraph 6.2(a)(iv) is less than the amount claimed in the Payment Claim; and

(vi) if the reason for the difference is that the Principal is retaining, deducting,

withholding or setting-off payment for any reason, the reason for the Principal retaining, deducting, withholding or setting-off payment.

(b) The failure of the Principal to set out in a Payment Statement an amount which it is entitled to retain, deduct, withhold or set off under this Agreement will not prejudice its right to subsequently exercise such right.

(c) If the Service Provider disagrees with a Payment Statement of the Principal, it can seek to resolve the dispute through the dispute resolution procedures set out in clause 13.

6.3 Payments

(a) The Principal must pay the amount stated in a Payment Statement or the amount claimed by the Service Provider in its payment claim (as the case may be):

(i) where a Payment Statement is issued pursuant to clause 6.2, within the later of:

A. 15 Business Days of the issue of the Payment Statement; or

B. 25 Business Days following receipt of the Payment Claim,

(ii) otherwise, within 25 Business Days following receipt of the Payment Claim.

(b) The making of a payment by the Principal under this clause 6.3:

(i) is not an indication of the value of the Services performed;

(ii) does not constitute an admission by the Principal that any Services provided by the Service Provider conform with the requirements of this Agreement;

(iii) is a payment on account only;

(iv) does not amount to a waiver of any right or action that the Principal may have against the Service Provider at any time.

6.4 Set Off

The Principal may at any time deduct from amounts otherwise payable to the Service Provider any debt or amount due from the Service Provider to the Principal or any claim to money which the Principal may have against the Service Provider whether for damages or otherwise.

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7. GOODS AND SERVICES TAX

7.1 To the extent that a party to this Agreement (**GST Supplier**) is or becomes liable to pay GST in connection with any Supply made under this Agreement and the amount of any such GST is not included in the amount payable under this Agreement:

(a) the GST Supplier may add to the price of the Supply an amount equal to the GST payable on the Supply (**GST Amount**); and

(b) the other party will pay the GST Supplier the price for the Supply in accordance with this Agreement plus the GST Amount.

7.2 If, for any reason, the GST Supplier's GST liability in respect of a particular Supply is different from the amount of GST paid by the other party:

(a) the GST Supplier must immediately repay to the other party the amount of any excess paid by the other party above the GST Supplier's GST liability; or
(b) the other party must pay the deficiency in the amount previously paid by the other party to the GST Supplier for that Supply, as appropriate.

7.3 Each party warrants that at the time any supply is made under this agreement on which GST is imposed, that party is or will be registered under the GST Law.

7.4 Any invoice rendered by a party to this agreement in connection with a Supply under this Agreement which seeks to recover an amount of GST payable by that party must conform to the requirements for a tax invoice (as that term is defined in the GST Law).

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8. VARIATIONS

(a) The Principal may, at any time, direct the Service Provider to carry out a Variation, by written notice to the Service Provider.

(b) Before instructing a Variation, the Principal may request the Service Provider to provide a written estimate of the time and cost effects of a proposed variation. A written estimate so requested must be provided by the Service Provider within a reasonable time nominated by the Principal.

(c) Any adjustment to the Fee payable to the Service Provider as a consequence of the direction in clause 8(a) is to be determined in accordance with clause 8(f).

(d) If the Service Provider disputes a determination by the Principal under clause 8(f)(ii) within 5 Business Days of the Principal making that determination, or such other time as agreed between the parties, the Service Provider may dispute the determination under clause 13.

(e) The Service Provider is to carry out the direction in clause 8(a), notwithstanding a dispute. The Principal will pay any Variation disputed by the Service Provider in accordance with clause 8(f)(ii) until a determination is made under clause 13.

(f) Unless the Principal otherwise agrees, the Fee will be increased or decreased for all Variations which have been the subject of a direction by the Principal by:

(i) an amount agreed between the Principal and the Service Provider using the rates in Annexure B and any amounts for Disbursements identified in the Contract Particulars, including agreement of a total Fee for the Variation where appropriate; or

(ii) failing agreement, reasonable rates and prices as determined by the Principal; or

(iii) if a Variation is determined under clause 13, the amount of a determination in accordance with clause 13, less any amount already paid by the Principal to the Service Provider for that Variation under clause 8(e).

(g) If a Variation omits or deletes any part of the Services, the Principal may thereafter either carry out those Services itself or engage a third party to do so.

(h) The Service Provider may, at any time, request a Variation by written notice to the Principal. The Principal may accept or reject the suggested Variation. If the Principal accepts a suggested Variation, the Principal will, in its absolute discretion, direct a Variation in accordance with clause 8(a) and clauses 8(c) to 8(g) will apply to that Variation.

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9. INTELLECTUAL PROPERTY

9.1 Contract Material

(a) Copyright (including future copyright) in all Contract Material, vests in the Principal or is otherwise hereby assigned by the Service Provider to the Principal. Title to, and Intellectual Property in, all Contract Material (other than copyright) shall, on creation, vest or otherwise be assigned or transferred to the Principal, without the need for further assurance.

(b) The Principal grants to the Service Provider a non-exclusive licence during the term of this Agreement to exercise Intellectual Property in the Contract Material solely for the purpose of performing the Service Provider's obligations under this Agreement.

9.2 Existing Contract Material

This Agreement does not affect ownership of the Intellectual Property in Existing Contract Material. The Service Provider hereby grants, and must ensure that relevant third parties grant, to the Principal, without additional cost, a perpetual, non-exclusive, royalty-free, irrevocable, transferable licence (which includes the right to sub-license third parties) to exercise the Intellectual Property in the Existing Material for the purposes of the activities of the Principal.

9.3 Perfection of rights

The Service Provider must execute all documents and do all acts and things required, at its cost (unless otherwise agreed), for the purposes of giving effect to the provisions of this Agreement dealing with Intellectual Property.

9.4 Moral Rights

The Service Provider must hold, or obtain, consents from all authors of Contract Material for the use of and adaptation of the Contract Material by the Service Provider or the Principal, without restriction and without any requirement to attribute the Contract Material to its authors.

9.5 Limitations on the use by the Service Provider of the Contract Material

The Service Provider must ensure that the Contract Material is used, copied, supplied or reproduced only for the purposes of this Agreement unless it has obtained the prior written approval of the Principal to do otherwise. Any such approval may be given on any terms or conditions the Principal considers appropriate.

9.6 Warranty

The Service Provider represents and warrants that:

(a) it has all appropriate licences of, or title to, all Intellectual Property that is required by it for the purpose of its obligations under this Agreement; and

(b) it has authority to assign or license (as the case may be) all Intellectual Property rights granted to the Principal under this Agreement.

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10. INDEMNITY

(a) The Service Provider agrees to indemnify and keep indemnified the Principal and its officers, employees and agents (those indemnified) against any loss, damages, liability or costs (including reasonable legal costs and expenses), incurred or suffered by any of those indemnified where such liability or loss is incurred by reason of or in connection with:

(i) any infringement or alleged infringement of any Intellectual Property rights (including Moral Rights) arising out of the supply or use of the Services or any Contract Material provided under this Agreement; and/or

(ii) any unlawful, wrongful, wilful or negligent act or omission by or on behalf of the Service Provider in connection with this Agreement.

(b) The Service Provider's liability to indemnify those indemnified under this Agreement shall be reduced proportionally to the extent that any unlawful, wrongful, wilful or negligent act or omission of those indemnified caused or contributed to the liability or loss.

(c) The indemnity contained in this clause 10 is a continuing obligation of the Service Provider separate and independent of any other responsibility or obligation of the Service Provider and will continue beyond the period of this Agreement. It is not necessary for the Principal to incur expense or make any payment before enforcing its right of indemnity under this clause 10. The Service Provider must pay on demand any amount it must pay under the indemnity in this clause 10.

10A LIMITATION OF LIABILITY

(a) Subject to clause 10A (b), the Service Provider's aggregate liability to the Principal in contract, tort (including negligence) or otherwise under or arising out of this Agreement is limited to the amount specified in Item 13 of the Contract Particulars.

(b) The limitation of liability in clause 10A (a) will not apply to:

(i) any liability arising under clause 10A (a)(i);

(ii) any liability which arises out of or in connection with any unlawful, wrongful or wilful act or omission by or on behalf of the Service Provider in connection with this Agreement, including any wilful or reckless misconduct, fraud or criminal conduct;

(iii) the extent to which the Service Provider is indemnified under a policy of insurance required to be effected under clause Section 4.17 (a)(i) and 4.17 (a)(iii) of the Agreement;

(iv) the extent to which an insurer does not respond to a claim made by the Service Provider under a policy of insurance required to be effected under clause 4.17 because of an act or omission of the Service Provider or a failure by the Service Provider to comply with its insurance obligations;

(v) the extent to which the Service Provider would have been entitled to be indemnified for the liability or loss but for a reduction in the amount payable under a policy of insurance required to be effected under clause 4.17 because the insurer makes a successful denial or reduction of liability by reason of inclusion in this Agreement of any provision;

(vi) any liability which arises out of or in connection with the Service Provider's abandonment of its obligations under this Agreement;

(vii) any liability for breach of confidence or privacy or misuse of Personal Information;

(viii) any liability for personal injury (including death) or illness to any person; or

(ix) any liability which cannot be limited at law,

and those liabilities will not be included in any calculation of the Service Provider's aggregate liability under clause 10A (a).

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11. TERMINATION

11.1 Completion of the Services

This Agreement will terminate upon completion of the Services by the Service Provider to the satisfaction of the Principal.

11.2 Termination for convenience

The Principal may terminate the Agreement at any time for its sole convenience and for any reason, by written notice addressed to the Service Provider and thereafter, at its absolute discretion, complete the uncompleted part of the Services either itself or by engaging other consultants or contractors.

11.3 Termination by the Principal for insolvency or default by the Service Provider

If the Service Provider:

(a) becomes bankrupt, or insolvent, or enters into a scheme or arrangement with its creditors, or is placed into liquidation or provisional liquidation, or placed under official management or receivership;

(b) fails to carry out the Services with due diligence and competence;

(c) without reasonable cause suspends the carrying out of the Services;

(d) commits a breach of this Agreement; or

(e) in the opinion of the Principal has a conflict of interest in performing the Services;

then the Principal may, without prejudice to its right to terminate this Agreement under clause 11.1 or 11.2:

(f) in the case of the circumstance specified in clause 11.3(a), forthwith terminate this Agreement by notice to the Service Provider; or

(g) in the case of any other circumstance specified in this clause 11.3 give notice to the Service Provider specifying the circumstance and requiring the Service Provider to remedy it; and

(h) if the Service Provider fails to remedy the circumstance within 14 days or such longer period as is specified by the Principal under clause 11.3(g), terminate this Agreement by a further notice to the Service Provider.

11.4 Effect of termination

Termination of this Agreement by either party is without prejudice to any accrued rights or remedies of either party. The Principal may following termination enter into a contract with any person to complete provision of the Services or complete provision of the Services itself.

11.5 Payment on termination

(a) Upon termination of this Agreement, the Principal will pay the Service Provider for the Services performed by the Service Provider in accordance with this Agreement up to the date of termination.

(b) To the maximum extent permitted by law, the Principal's total liability to the Service Provider arising out of or in any way in connection with the termination of this Agreement will be limited to the amount payable by the Principal to the Service Provider under clause 11.5(a).

(c) In the case of termination under clause 11.3, the payment under clause 11.5(a) shall take into account any adjustments and deductions for loss or damage suffered, or reasonably likely to be suffered by the Principal as a consequence of breach of this Agreement by the Service Provider. The Principal may offset any money due against any money payable by the Service Provider to the Principal and recover any short-fall from the Service Provider as a debt immediately due and payable.

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12. CONSEQUENCES OF TERMINATION

(a) Without limiting the Principal’s rights in relation to this Agreement, if the Principal pre-paid any amounts to the Service Provider for Services to be performed which at the date of termination have not been performed and this Agreement is terminated for any reason:

(i) the Service Provider must refund to the Principal such prepaid amounts, within seven (7) days of termination of this Agreement; and

(ii) the Principal may recover in an appropriate court the balance of any prepaid amount not refunded as a debt due and payable by the Service Provider to the Principal.

(b) The Service Provider must, except to the extent approved by the Principal in writing, deliver to the Principal, within 7 days of termination or expiry of this Agreement:

(i) all Confidential Information of the Principal;

(ii) all Contract Material and the Principal's Material; and

(iii) all copies of (i) and (ii) above.

(c) The Service Provider may retain one copy of the Contract Material for record keeping purposes, subject to the confidentiality and privacy requirements contained in this Agreement.

(d) The Service Provider must for a minimum period of seven years following the expiration or termination of this Agreement, keep any operational records and project data relating to the provision of the Services securely and in a form and manner as to facilitate access and inspection under this Agreement.

(e) Clauses in this Agreement dealing with access to records, licences and consents, confidentiality, intellectual property, insurance, consequences of termination, effect of termination, payment, professional indemnity insurances (where applicable), indemnities, dispute resolution, and any other provision of this Agreement which by its nature should survive termination shall survive termination, expiry or repudiation of this Agreement.

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13. DISPUTE RESOLUTION

13.1 Negotiation

Either party may give the other party written notice of a dispute which adequately identifies the details of the dispute.

The Service Provider and the Principal will endeavour to resolve any dispute by negotiation.

13.2 Expert Determination

(a) If a dispute between the Service Provider and the Principal:

(i) is agreed by both parties to involve a claim or claims not exceeding the amount specified Item 12 of the Contract Particulars in the aggregate for either party; and

(ii) is not resolved by negotiation, then, subject to the parties' right to seek injunctive or urgent declaratory relief, before either party has recourse to litigation, the parties must co-operate to submit the dispute to determination by an independent expert (**Expert**) agreed between the parties.

(b) If the Service Provider and the Principal do not agree upon an Expert, either party may request the Australian Commercial Disputes Centre to nominate an Expert and the dispute shall be referred to such nominee.

(c) The Expert shall be appointed on terms which include the following:

(i) the Expert may meet with the parties jointly but must not meet or communicate with either party separately;

(ii) during any meeting with both parties, the Expert may ask questions of the parties which must be answered orally or in writing as requested by the Expert;

(iii) the determination of the Expert shall be made as an expert and not as an arbitrator; and

(iv) as soon as possible, and, unless otherwise agreed by the parties and the Expert, within 60 days of the acceptance by the Expert of the appointment, the Expert must give the parties a determination in writing as to the respective rights and entitlements of the parties, including the amount, if any, due from one party to the other.

13.3 Submissions

Within 14 days of acceptance by the Expert of the appointment, any party making a claim will submit their claim in writing to the Expert and within a further 7 days, the other party will submit its response to the claim. All such submissions shall include all evidence which the parties wish the Expert to take into account. A copy of all submissions and any documents sent to the Expert must be sent to the other party at the same time.

13.4 Effect of determination

The determination of the Expert shall be final and binding on the parties except where the Expert's determination relating to a dispute is that one party shall pay to the other an amount that is greater than, or carry out work without charge to the value of in excess of, the lesser of the total Fee, or $100,000, and either party gives notice to the other party of its dissatisfaction with that determination within 28 days of the determination being given.

13.5 Costs

The Principal and the Service Provider will each bear their own costs of the determination and will each bear half the Expert's fee and any associated expenses of the Expert.

13.6 Continuing performance

Each party must continue to perform its obligations under this Agreement, notwithstanding the existence of a dispute.

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14. NOTICES

(a) Any notice or other communication given under this Agreement:

(i) must be in writing addressed to the intended recipient at the address shown for the recipient in Item 7 of the Contract Particulars or the address last notified by the intended recipient to the sender;

(ii) must be signed by an authorised officer of the sender;

(iii) will be taken to have been delivered:

A. in the case of delivery in person - when delivered to the recipient’s

address for service;

B. in the case of delivery by post - within three business days of posting;

C. in the case of delivery by facsimile – at the time of dispatch if the sender receives a transmission report which confirms that the facsimile was sent in its entirety to the facsimile number of the recipient.

(b) If delivery or receipt of a notice occurs on a day that is not a Business Day, or occurs later than 5.00 pm (local time) on any day, it will be taken to have occurred at the commencement of business on the next Business Day.

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15. GOVERNING LAW AND JURISDICTION

This Agreement is governed by and must be construed according to the law applying in New South Wales. Each party irrevocably:

(a) submits to the non exclusive jurisdiction of the courts of New South Wales, and the courts competent to determine appeals from those courts, with respect to any proceedings that may be brought at any time relating to this Agreement; and

(b) waives any objection it may now or in the future have to the venue of any proceedings, and any claim it may now or in the future have that any proceedings have been brought in an inconvenient forum, if that venue falls within clause 15(a).

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16. AMENDMENTS

This Agreement may only be varied by a document signed by or on behalf of each party.

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17. WAIVER

(a) Failure to exercise or enforce, or a delay in exercising or enforcing, or the partial exercise or enforcement of, a right, power or remedy provided by law or under this Agreement by a party does not preclude, or operate as a waiver of, the exercise or enforcement, or further exercise or enforcement, of that or any other right, power or remedy provided by law or under this Agreement.

(b) A waiver or consent given by a party under this Agreement is only effective and binding on that party if it is given or confirmed in writing by that party.

(c) No waiver of a breach of a term of this Agreement operates as a waiver of another breach of that term or of a breach of any other term of this Agreement.

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18. FURTHER ACTS AND DOCUMENTS

Each party must promptly do all further acts and execute and deliver all further documents (in form and content reasonably satisfactory to that party) required by law or reasonably requested by another party to give effect to this Agreement.

19. CONSENTS

A consent or approval required under this Agreement from a party may be given or withheld, or may be given subject to any conditions, as that party (in its absolute discretion) thinks fit, unless this Agreement expressly provides otherwise.

20. ASSIGNMENT

The Service Provider cannot assign, novate or otherwise transfer any of its rights or obligations under this Agreement without the prior consent of the Principal.

21. NO REPRESENTATION OR RELIANCE

(a) Each party acknowledges that no party (nor any person acting on a party's behalf) has made any representation or other inducement to it to enter into this Agreement, except for representations or inducements expressly set out in this Agreement.

(b) Each party acknowledges and confirms that it does not enter into this Agreement in reliance on any representation or other inducement by or on behalf of any other party, except for representations or inducements expressly set out in this Agreement.

22. ENTIRE AGREEMENT

To the extent permitted by law, in relation to its subject matter, this Agreement:

(a) embodies the entire understanding of the parties, and constitutes the entire terms agreed by the parties; and

(b) supersedes any prior written or other agreement of the parties.

23. SEVERANCE

If at any time a provision of this Agreement is or becomes illegal, invalid or unenforceable in any respect under the law of any jurisdiction, that will not affect or impair:

(a) the legality, validity or enforceability in that jurisdiction of any other provision of this Agreement; or

(b) the legality, validity or enforceability under the law of any other jurisdiction of that or any other provision of this Agreement.

24. PRINCIPAL’S POLICIES

The Service Provider must comply with all of the Principal's policies that are relevant to

the Service Provider carrying out the Services which are provided to the Service Provider by the Principal.

25. INFORMATION DOCUMENTS

(a) The Service Provider acknowledges that the Principal does not warrant, guarantee, assume any duty of care or other responsibility for or make any representation about the accuracy, adequacy, suitability or completeness of the Information Documents, and the Information Documents do not form part of this Agreement.

(b) The Service Provider acknowledges and warrants that:

(i) it did not place any reliance upon the completeness, accuracy or adequacy of any information documents;

(ii) it entered into this Agreement based on its own investigations, interpretations, deductions, information and determinations; and

(iii) it is aware that the Principal entered into the Agreement relying upon the acknowledgements, warranties and deemed matters in this clause 25 and that the Principal would not have entered into the Agreement but for those acknowledgements, warranties and matters.

26. EXCLUSIVITY

(a) The Service Provider must not and must procure that:

i. any Related Body Corporate of the Service Provider; and

ii. any employees, agents, subcontractors and consultants who are involved in the provision of the Services.

do not prior to the date on which all principal delivery contracts relating to the procurement of the North West Rail Link become unconditional:

iii. have any direct or indirect involvement in the North West Rail Link other than for the Principal or the New South Wales Government; or

iv. provide services to or advise any other person in relation to the North West Rail Link,

except with the prior written consent of the Principal which may be withheld or granted in its sole discretion.

(b) The Service Provider agrees that:

i. having regard to the North West Rail Link and the Services, clause (a) is reasonable as regards the nature of the involvement restrained and the duration and scope of the restraint and that the restraints are reasonably necessary for the probity of the North West Rail Link and to ensure the best value for money for the North West Rail Link; and

ii. damages may not be a sufficient remedy for the breach of clause (a) and the Principal may be entitled to specific performance or injunctive relief (as appropriate) as a remedy for any breach or threatened breach by the Service Provider, in addition to any other remedies available at law or in equity.

END